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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

THE COCA-COLA COMPANY,
Petitioner,
vs.
THE KOKE COMPANY OF AMERICA,
THE SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS,
THE KOKE COMPANY OF OKLAHOMA and
THE KOKE COMPANY OF ARKANSAS,
Respondents.
No. 101

Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF AND ARGUMENT FOR PETITIONER

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PRESS OF B. R. PRINTING COMPANY, ST. LOUIS

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The respondents in their brief and argument in this Court renew every contention made by them in the District Court and in the Court of Appeals, notwithstanding every issue of fact in the case was decided against them by both those courts, except the isue as to unclean

hands, which was decided adversely to petitioner by the Court of Appeals and by that alone.

Unclean Hands.

As to the issue of "unclean hands," the Court of Appeals held that three facts were shown which, taken together, constituted "such deceptive. false, fraudulent and unconscionable conduct as precludes a court of equity from granting it (petitioner) any relief."

These three facts were (a) "that in the beginning, and for many years thereafter, the coca of which its (petitioner's) compound was in large part made contained the deadly drug cocaine," (b) "the caffeine, which constituted the other main ingredient, was derived mainly and indeed almost exclusively, not from cola nuts, but from tea leaves," and (c) during this period the compound was widely advertised and sold "as a brain and nerve tonic and stimulant, as a cure of headache, neuralgia, hysteria, melancholy and of nervous afflictions, under which representations a tremendous consumption was built up."

The Court of Appeals found also that "long prior to the bringing of the present suit" the drug cocaine was practically eliminated from the drink," and by necessary implication that the character of the advertisements was radically changed at the same time.

The change made in the product and in the advertising did not, however, in the opinion of the Court of Appeals, relieve the petitioner from the imputation of unclean hands, for two reasons—first, because, in its opinion, "large numbers of the appellee's customers still consume the mixture" under the influence of the old advertisements, and, second, "the caffeine of which it has since been mainly composed, still comes mainly, if not entirely, from other sources than the cola nut."

As to all these facts, the evidence itself is in entire harmony, and the question in each instance is as to the conclusion properly to be drawn.

The only change made in the beverage itself, we concede, was the elimination of the cocaine from the coca leaf used. In other respects it remained just the same. What this change signified depends upon the amount of cocaine contained in the coca leaves which were originally, and still are, used in making the beverage. The Court of Appeals says simply that in the beginning, the *coca* of which the compound was in large part made, contained the deadly drug *cocaine*. Not content with this statement, which itself greatly stresses the fact, the respondents go farther and charge (p. 37 of their brief) Dr. Pemberton with the deliberate purpose of imposing the cocaine habit upon the public by using the drug as an element of a popular beverage. And the

odium of this they pass along to the petitioner as an incident of the business acquired by it from the doctor. Such a suggestion comes with ill grace from those who confessedly acquired from the Doctor an interest in his Wine of Coca, and who insist further that they acquired from him the major interest in Coca-Cola itself.

The statement made by the Court of Appeals goes to the utmost limit of what is warranted by the evidence, in which there is no dispute, and considered apart from that evidence, suggests rather more than is true. The Court says that the *Cola* of which the beverage was in large part made *contained the deadly drug cocaine.* How large was the part of coca in the compound? Three hundred and eighty pounds of leaves in nine hundred gallons of extract, of which in turn sixteen gallons was used in making twelve hundred and fifty gallons of the syrup. (Rec., p. 911.) An ounce of this syrup with six ounces of carbonated water constituted the draught as served at the fountain. The coca leaf contains one-half of one per cent. of cocaine. An arithmetical calculation will show that the drink taken at the fountain contained one-six hundred and ninety-ninth (1/699) of a grain of cocaine, and no more.

This certainly gives no support to the suggestion of a deliberate evil purpose on the part of Dr. Pemberton and his early associates, nor does it tend to prove any-

thing other than was testified to by Mr. Robinson which was that in a purely experimental way they went about to find a pleasant, palatable and mildly stimulating drink into the composition of which the coca leaf entered to the extent stated, and cocaine, as an element of the coca leaf, to one-two hundredth (1/200) part of that.

The respondents are not content with what the Court of Appeals said as to the early advertising, and seek to add to its force by the parade of particular labels, none of which is shown to have been used by any successor to Dr. Pemberton or any predecessor of the petitioner, after 1892.

Respondents' Exhibit 23, shown opposite Page 26 of their brief, relates solely to Dr. Pemberton's Wine of Coca, with which no successor of Dr. Pemberton, in petitioner's line of title, ever had anything to do, and the label itself was never used in connection with Coca-Cola.

Respondents' Exhibit 271 is displayed opposite Page 40 of the brief. This is the label which Pemberton registered in the Patent Office in 1887. They say that this is the label "with which all packages or containers of this Coca-Cola were labeled." There is no evidence to support this statement. The exhibit, itself, was photographed from the label as filed in the Patent Office.

There was no showing as to its use in business at any time by anybody.

Exhibit 76, referred to on Page 14 of the brief, is simply a letter-head used in the business when it was conducted by Asa G. Candler. He sold the business to The Coca-Cola Company in 1892.

Respondents' Exhibit 21, displayed opposite Page 28 of the brief, is a photograph of stationery used by the Pemberton Medicine Company, a partnership of which J. C. Mayfield, Sr., was the active member, with which neither petitioner, nor its predecessors in right and title, ever had anything to do, and from which they never derived any right or title to the Coca-Cola business.

The medical advertisements mentioned by the Court of Appeals ceased, when, about 1899 or 1900, petitioner decocainized the coca leaves used and thus eliminated the cocaine entirely from the beverage, since which time nothing more of anything that can be said to be even of a medicinal flavor is shown to have been used, other than plaintiff's Exhibit 92, the little pamphlet, "The Truth About Coca-Cola," in which it is said that the beverage relieves headache, as do tea and coffee.

That the business which was built up by petitioner was so built up, in part at least, because of the char-

acter of the advertisements used, must be conceded, and to that extent we accept without question, the finding of the Court of Appeals. But that despite the change in the advertising made in 1900, "large numbers of the appellee's customers still consume the mixture" under the influence of the old advertising, is an inference pure and simple. No one testifies directly to anything of the sort. In a matter of this kind the force of inertia would operate to some extent, the longer, the less it was resisted. But here it was most vigorously resisted. The respondents, themselves, in their Court of Appeals brief, page 156, said: that after the passage of the war tax of 1898, and because of it, the petitioner changed radically the character of its advertisements and "cut out all references to headache and exhaustion * * * and every statement or representation therein which it thought could be construed as a holding out that the stuff was a medicine or was a remedy or specific for any ailment." This is a strong statement and really needs the qualification that after 1898 Coca-Cola was commended, not indeed as a medicine, but as a beverage, which like tea or coffee would relieve headache or exhaustion. But the statement is true, in so far as it asserts that after 1898 there was none of the advertising as a medicine under which the Court of Appeals held "a tremendous consumption was built up."

We have here an entire departure from the system of advertising disparaged by the Court of Appeals and for at least fourteen years before the suit was brought an entire abandonment of any claims of medicinal virtues not warranted by the facts.

The quotation from *Worden v. California Fig Syrup Company*, 187 U. S. 517, l. c. 538, on Page 89 of the respondents' brief, omits something essential to its real significance. We quote the entire paragraph, italicising what respondents omitted.

> "That the complainant company, years after it had established a popular demand for its product, issued statements in medical journals and newspapers and circulars, that the medical properties of their compound were derived from senna, does not relieve it from the charge of deceit and misrepresentation to the public. *Such publications went only to giving information to wholesale dealers.* The company by the use of the terms of its so-called trademark on its bottles, wrappers and cartons continued to appeal to the consumers, out of whose credulity came the profits of their business. And, indeed, it was the imitation by the defendants of such false and misleading representations that led to the present suit."

In the case at bar there was a change in the beverage by the elimination of cocaine, and a change in the advertisement of it *to the public*. All the advertising of

Coca-Cola from the beginning was addressed to the general public; none of it to the medical profession, and that to dealers was but an incident of the appeals to the general public. The purpose of it determined its character; it was to create a popular demand.

How vigorous and aggressive the new advertising was is shown by the figures. Prior to 1900 the advertising expense had grown from $11,401.78 in 1892, when extensive advertising was begun, to $48,564.43 in 1899, while it went up with a bound to $84,507.97 in 1900, increasing year by year greatly and steadily, reaching the sum of $1,186,210.39 in 1913, the last full year before the bringing of this suit. The sales of the syrup responded accordingly. Thirty-five thousand, three hundred and sixty (35360) gallons were sold in 1892, and 281,055 in 1899, while in 1900 the sales were 370,877 gallons, and had increased to 6,767,822 in 1913.

There is no evidence in the record even tending to show that anybody, during the fourteen years preceding the institution of the present suit, bought and used Coca-Cola as a medicine in the true sense of that word. They bought and drank it as a palatable, refreshing and stimulating beverage. Some witnesses did testify that some people thought there was cocaine in all cola drinks, but to the extent that any such opinion persisted it was not due to anything done or said by

petitioner. That opinion, which from the evidence appears to be an almost extinct tradition, was vigorously and publicly combatted by petitioner in every possible way, while the respondents did and are doing everything possible to keep it alive.

Vis inertia is the only thing suggested by the Court of Appeals to support its opinion that anybody now uses Coca-Cola because of the advertising of twenty-years ago, or that anybody, because of that advertising, now believes that Coca-Cola contains cocaine. We submit, upon the other hand, that whatever force petitioner set in motion in that distant past, has long since been overcome or spent itself.

Coca-Cola Contains Cola Nuts.

The court did not find that Coca-Cola did not contain cola nuts. In fact the necessary inference of the opinion is that it did. The opinion with respect to the use of the word "cola' 'in the name is that this is unwarranted, because the cola nuts used do not supply all, or most, or a substantial portion of the caffeine in the drink. Confessedly the beverage could not be made a pleasant and palatable one if cola nuts were used to an extent sufficient to furnish all the caffeine. Pure caffeine must be used in addition to the cola nut to make the beverage what it is. What difference does it

make from what source this added caffeine is derived when the thing derived is absolutely the same? If one batch of syrup was made with the added caffeine, gotten from the cola nuts, and another with the added caffeine, made from tea, the two would be indistinguishable, because they would be chemically, therapeutically, dietarially and gustatorially just the same. The word "cola" was not designed to proclaim the source of the caffeine used. When Pemberton and his associates, by mere experimentation, finally got a beverage they thought would be popular, they had in their formula a certain amount of coca leaves and of cola nuts, and of pure caffeine. Cola did not suggest caffeine, because caffeine was not commercially derived from cola. Now, if no caffeine had been added, and only the cola nuts had been used, could it be said that the name was deceptive because the prescribed amount of cola nuts would yield very little caffeine? In what proportion must any ingredient be found in a beverage like this to justify the use of a name that suggests its presence? Respondents say that the cola signifies nothing, and is used only as a pretext for the name. Cola nuts contain from two to seven per cent. of caffeine. So there is much more of caffeine in the one hundred and twenty-five pounds of cola nuts, used in making a batch of Merchandise No. 5, than there was of cocaine in the three hundred and eighty pounds of the coca leaves.

The argument of respondents is to the effect that as applied to the original formula, the word "coca" is defective as a trademark, because it is descriptive, and cola is so because it is deceptive. The matter is brought down to a question of the relative values of the different ingredients used, and these are difficult of determination. It would have been quite as easy to maintain that the word "coca" was deceptive because of the small amount of cocaine it contributed, as to maintain that the word "cola" was deceptive because of the small amount of caffeine it contributed. The answer in each instance would be there was in the formula some coca and some cola. Just what each element was worth in the beverage Dr. Pemberton proceeding by varying tests and trials could not determine. But he got at last a result that satisfied him, and he got it without chemical analysis, and he determined by taste and without chemical analysis that it was what he wanted. And no other method would serve his purpose. The Encyclopedia Americana says of the cola nut, that "an analysis of it shows that it contains nearly all the constituents of coffee, tea and coca, and other constituents not possessed by them. But although the chemists can get at the elements of cola, a full explanation of its hidden potency has eluded them." We submit that cola being used in making

the compound, the addition of pure caffeine, however derived, did not vitiate the name.

Elimination of the Cocaine Did Not Invalidate the Trademark.

Some time before the Food and Drugs Act was passed, the petitioner eliminated any trace of cocaine from the beverage. The respondents concede this was so at least from the date of that act, which was June 30, 1906.

In their Court of Appeals brief, page 186, they say:

> "To avoid having to print on its labels a statement of the quantity or proportion of cocaine contained in 'Coca-Cola,' plaintiff decided to revise its product and eliminate the cocaine."

In the brief filed in this Court, the respondents, p. 100, say of plaintiff that:

> "After having built up a big business in the sale of a cocaine-containing drink, it took out the cocaine, *but did not change the name of the drink.*"

Here, as elsewhere in their argument, respondents deal with the terms coca and cocaine as being identical. They are far from being so. The cocaine in the leaf constitutes but one-half of one per cent. of its weight.

According to their chemist the total of soluble solids in the leaf is forty-six per cent. of its weight. In eliminat- the cocaine less than one-fifth of the solids are removed, leaving four-fifths of the soluble solid matter which goes into Merchandise No. 5. In making a batch of this extract out of the one hundred and eighty pounds of solids in the original leaf, one hundred and sixty pounds enter into the composition of the extract. It is obvious from this that coca and cocaine are not identical, especially so when we are dealing with a popular beverage used at pleasure by the people and not with a medicine to be taken upon the prescription of a physician.

It certainly was not wrong to eliminate the cocaine when the general opinion had come to be that cocaine in any quantity was deleterious.

But respondents contend that to continue the name "Coca-Cola" and the use of the coca leaf emblem on the labels, when the cocaine had been eliminated, was a fraud upon the public. How so, when more than four-fifths of the extractive matter of the leaf is still contained in the beverage and the public advised in two ways of the change. The petitioner, by persistent and extensive advertising to the public, spread the information far and wide that the cocaine had been eliminated. The law required that, if cocaine was contained

in the beverage, the fact must be announced, and the proportion of cocaine used, disclosed. The absence of any such announcement and the fact that the beverage was openly sold in every city, town, village and cross-roads in the country, without let or hindrance by the public authorities, made every sale of it an assertion that it was free from cocaine. If any one thought otherwise it was simply because the wish was father to the thought. And that wish was aided, not by anything that petitioner did, but by the diligent effort of respondents to give currency to the term "dope" as either the name of its own beverage or as a generic term for all "cola" drinks.

There was then no misrepresentation as to cocaine. None was announced, and none existed.

And there was no misrepresentation as to coca. There was coca in the beverage, as much as was left after the cocaine was extracted. Of the solvent matter in the leaves, there remained five times as much as had been eliminated.

The cases cited by respondents in this connection are not in point. In the case of the *Independent Baking Powder Company v. Boorman*, 175 Fed. Rep. 448, the change in the product was a vital one. The trademark, identified exclusiveley with an alum baking powder,

was transferred to one in which phosphate was substituted for alum, which meant transferring it from one distinctly recognized class of goods to another.

In *Prince Manufacturing Company v. Prince's Metallic Paint Company,* 135 N. Y. 24, the facts were that the paint to which the trademark attached was for years made of ore taken from a particular mine, and was represented to be of superior quality because of that fact, a representation which was accepted by the public as true and as a consequence a valuable good will had gathered about the trademark. The ore in this mine became insufficient to meet the demand for it, and the complainant then used ore from other mines, which it had itself represented to be inferior, without advising the public that it was so doing. Respecting such conduct the Court, l. c. 39, said:

> "A party can not secure the confidence of the public in an article on the ground that it is made from one material, of which the trademark is a guaranty, *and then without advising the public,* substitute another material, and sell that upon the credit of the true article, and justify the false use of the trademark or label on the ground of a similar quality."

The facts here are very different. Coca was used in the beverage, and as originally used it supplied just

so much cocaine as was contained in the coca. This element of the coca, thought to be deleterious was eliminated, which confessedly could be done without impairment of its quality as a popular beverage, and it was done in consonance with law and with the knowledge of the public. No case is to be found in which an improvement in the formula of a food preparation so made is held to be a fraud upon the public or as invalidating the trademark applied to the preparation.

Elimination of Cocaine Was Not Adulteration.

Under the Food and Drugs Act an article of confectionery is held to be adulterated "if it contain * * * narcotic drug." An article of food is held to be adulterated "if any valuable constituent of the article has been wholly or in part abstracted." * * * "if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health."

A beverage containing cocaine in any appreciable quantity would be held to be adulterated under the terms of this act, because of the presence of the cocaine. Respondents' argument is to the effect that it would also be adulterated if the cocaine was eliminated, but under the law there is no adulteration in elimination unless a "*valuable* constituent of the article has

been wholly or in part abstracted." Cocaine is not a valuable food element. And so this court pointedly held in the Coca-Cola case, 241 U. S. l. c. 281, that Congress did not intend to induce the continued use of a deleterious ingredient by making its "elimination an adulteration, subject to the penalties of the statute." It was an admitted fact in that case, that there was no cocaine in Coca-Cola, bu notwithstanding this the court remanded the case for the jury to determine the presence of *any coca ingredient.*

Elimination of Cocaine Did Not Result in Misbranding.

Inasmuch as the elimination of the cocaine, which was not a valuable, but a deleterious ingredient of the beverage, was not an adulteration of it, and the elimination being required by the law, and being moreover a matter of common public knowledge, the original content of coca leaves being retained, no change of name was called for and the continuation of the old name was justified. The beverage remained exactly what it had been, save that it was improved by the removal of what might be harmful.

The issue in the government case so far as the misbranding was concerned was whether the product contained any coca. That it contained no cocaine was conceded. The court said, l. c. 285, that "there was

evidence on the part of the government tending to show that there was nothing in the product *obtained from the leaves of the coca plant,* while on behalf of the claimant it was testified that the material called Merchandise No. 5 (one of the ingredients) was obtained from both coca leaves and cola nuts." Here was an issue of fact, which, however the trial court did not submit to the jury, that court holding the issue to be immaterial upon the ground that the article "was within the protection of the proviso in Section 8 of the Food and Drugs Act as one known under its own distinctive name." This court held that the name "coca" implied the presence of something in the article derived from the coca leaf, and so could not be the distinctive name of something which contained no coca "unless the name has achieved a secondary significance as descriptive of a product known to be destitute of the ingredients indicated by its primary meaning." (l. c. 289.) As to this the court said, l. c., p. 289:

> "In the present case we are of the opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged. Nor is there basis for the conclusion that the designation had attained a secondary meaning as the name of a compound from which either coca or cola ingredients were known to be absent; the claimant has always insisted, and now insists, that its product

> contains both. But if the name was found to be descriptive, as charged, there was clearly a conflict of evidence with respect to the presence of any coca ingredient. We conclude that the Court erred in directing a verdict on the second count."

The issue of fact was held to be a material one, and there was a misbranding of the article if, as contended by the government, "there was nothing in the product obtained from the leaves of the coca plant" and on the other hand there was no misbranding if "the material called Merchandise No. 5 (one of the ingredients) was obtained from both coca leaves and cola nuts."

That Merchandist No. 5 is an extract of cola nuts and decocainized coca leaves is conclusively established by the evidence, and the substantial contention of respondents is that the coca leaf as used is of no significance in making the beverage. But such was not the holding of this Court in the government case, nor was it the opinion of Congress in passing the *Harrison Act of December 17, 1914,* Comp. Stat. U. S. 1916, Vol. 6, p. 7266, in which preparations of coca leaves not containing cocaine, and so intended for use not as a medicine, but as a beverage, were expressly exempted from the provisions of the Act.

Coca-Cola Designates Exclusively the Product of the Petitioner.

In the Government case no element of trademark law was involved. The decision there was that the name "Coca-Cola" had not gained a secondary significance *as indicating something that contained no coca or cola ingredients.* The question here is whether a name which in itself is suggestively descriptive, could acquire, and has acquired, a secondary significance *which indicates the maker of the product.* Respondents contend that the name is purely descriptive and signifies only certain ingredients of the beverage and not the maker. Cases are cited to support this contention, but they all hold the question to be one of fact, difficult, but not impossible, of proof. In *Reddaway v. Banham* (1896), Appeal Cases, 199 l. c. 202, Lord Halsbury said:

> "I believe that this case turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your Lordships have been engaged, that it is sometimes difficult when examining former decisions to disentangle what is decided as fact and what is laid down as a principle of law. For myself, I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else.

"How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact the legal consequence appears to follow.

"In this case the words 'Camel hair belting' suggest such a difficulty of proof. If I had been sitting as a juryman in this case I confess (but for a circumstance I am about to mention) I should have had great difficulty in acquiescing in the contention that a person was making his goods pass as the goods of somebody else by simply describing the subject of sale by these words. It is partly made or substantially made of camel hair, and it is belting. To me or to other persons not familiar with the trade this undoubtedly does seem simply a description of the article sold, and not a representation of its being made by a particular manufacturer. But then I should not know, what persons engaged in the trade would know, how far particular words, even though descriptive of the article sold, may have acquired a kind of technical signification which would give to them in the trade as completely the character of being made by a particular manufacturer as if they were stamped with his trademark.

"The circumstance to which I referred is to be found in the letter of June 12, 1891. The writer, who doubtless knew what he was doing, specially desires that the thing which he is ordering should

bear no other stamp than 'Camel Hair Belting' and if he gets that he adds 'I think I can take this order from Reddaways.'

"My Lords, I think with this letter before them the jury were perfectly right, and my *prima facie* impression from the words being only descriptive of the article sold would have been wrong. The result is, in my mind, that the proof is satisfactory, and that one man's goods are being sold as if they were the goods of the other."

And Lord MacNaghten said, l. c., p. 220:

"Cases of this sort must depend [illegible] ticular circumstances. The facts of one case are little or no guide to the determination of another."

The doctrine is tersely stated by the Lord Ordinary in the Cellular Clothing Company case, as quoted by respondents on page 157 of their brief:

"The name being simply descriptive, it is • • • extremely difficult to appropriate such a name by attaching to it a secondary and restricted sense which shall make it, not a descriptive name, but a name for the goods of some particular maker. Still this is, as has been held, possible. I must, therefore, consider the evidence by which the Pursuers propose to establish the transformation that they allege."

We accept what is said as to the difficulty of proof. We acknowledge the burden it imposes. We might rest upon the findings of the lower courts, but it is proper for us to add and to show that the evidence is conclusive and without conflict, and that the difficult but possible thing has been accomplished. We need not adduce the testimony offered on behalf of the petitioner nor say more concerning it than that it sustained the claim. We cite the testimony offered by respondents and all of it bearing upon this issue sustains and fortifies that of the petitioner.

For some years prior to 1886 coca leaves and cola nuts had separately come into medicinal use, and as medicines had been placed on the market in the form of proprietary preparations like Wine of Coca, Vin Mariana, etc. The use of these things as ingredients in a soda fountain beverage, however, originated with Dr. Pemberton in 1886, as narrated by Mr. Robinson (Rec., pp. 348 and 349). The soda fountain was already in use, and soda water, with its various fruit flavors, was a popular beverage. But coca and cola, as elements to any extent, were new and they suggested the name of the beverage, the precise formula of which was gotten by Dr. Pemberton, not as the result of any fixed principle, but by experiment. A satisfactory formula was reached in 1886, and the name "Coca-Cola"

was agreed upon. Pemberton and his associates made and sold the beverage under that name in small quantities, twenty-five gallons in 1886, and 1,049 gallons in 1887. The associates of Pemberton in his company, then the Pemberton Chemical Company, thought the formula was the property of the Company, but he claimed it as his own and they yielded to his claim. July 27, 1887, he registered the label "Coca-Cola Syrup and Extract for soda water and other carbonated beverages," declaring himself to be "sole proprietor."

He sold a two-thirds interest to Venable and Lowndes on July 8, 1887, and the contract for this was filed in the Patent Office July 14, 1887. With the written consent of Dr. Pemberton, Venable and Lowndes conveyed their interest to Mrs. M. C. Dozier and Woolfolk Walker on December 14, 1887. On April 14, 1888, Pemberton conveyed his remaining one-third interest to Walker, Candler and Jacobs, as Walker, Candler & Company, and August 30, 1888, Mrs. Dozier and Walker conveyed all their interest to Candler. April 22, 1891, Walker, Candler & Company made conveyance to Candler, vesting in him the entire interest, and he, on February 22, 1892, conveyed the entire interest to The Coca-Cola Company, the original petitioner in this suit.

Contemporaneous written contracts evidencing these various transfers were introduced in evidence.

The sale by Pemberton of Coca-Cola did not include his general medicine business. This he continued, and on January 14, 1888, formed a partnership for the further conduct of it with J. C. Mayfield, Sr., A. O. Murphy and E. H. Bloodworth. Mayfield and Murphy say that Coca-Cola was one of the assets contributed by Pemberton to this partnership. There is no contemporaneous written evidence of such a fact, and the stationery used by them at the time, as evidenced by respondents' Exhibit 21, opposite page 28 of their brief, discloses the Wine of Coca as the only coca preparation made and sold by them. They say that for two or three months in 1888, they made and sold Coca-Cola as such under an assumption of right to do so. This is denied by A. G. Candler, who says that Mayfield having sold Coca-Cola to two persons, "I got the bill and got after Mayfield about it * * * he told me he had a barrel of Coca-Cola that he had gotten in exchange for something and he was selling it out, but he would quit it" (Rec., vol. 11, p. 385).

There is ample reason for prefering Mr. Candler's version of this, but whatever the fact may be it is immaterial, as the time involved is only two or three months in the last of 1887 or first of 1888, and then all conflict ceases. The respondents have their own story in explanation of their quitting the use of the

name Coca-Cola. Dr. Pemberton, they say, announced to them that he had sold Coca-Cola to his son Charles, but he would get up for them "a substitute which would be identically the same thing under a different name." Murphy and Mayfield demurred to this claim on behalf of Charles, but none the less consented (Rec., vol. iv., p. 1283). Murphy continues on the same page:

> "This substitute he mentioned was not a different product from the one that we had heretofore been manufacturing except in name. We first started out with the name called Yum Yum, and then we got on to one or two others, Koke, and I think perhaps we got something into Dope, too, something like that."

This is denied by petitioner, but even if true is in aid of the present argument. What is true and also material is that Mayfield, Pemberton, Murphy and Bloodworth did not thereafter use the name Coca-Cola. The Coca-Cola sales for 1888 by the predecessor of The Coca-Cola Company amounted to 19,333 gallons of syrup.

After the short period of two or three months in the early part of 1888, during which Mayfield and Murphy say that they made and sold Coca-Cola as such, nobody except the then proprietors, and their successors in right and title, The Coca-Cola Company coming

into the ownership in 1892, ever made and marketed a soda fountain or carbonated beverage under the name of Coca-Cola. It is undisputed in the evidence that every ounce of the syrup made and sold under the name of Coca-Cola, after the early months of 1888, was made by the petitioner or by those under whom it claims.

It may be answered that so long as the petitioner was the only person to make the syrup, the name, if it bore but one name, would designate the product and not the producer. But the product was not a patented one, and the petitioner had no monopoly of its production. There were others early in the field with similar beverages, for as was said in the Cellular Clothing Company case, respondents' brief, page 157:

> "It is scarcely credible that * * * men of business will be found to suppose that a manufacture that has taken the market, and is unprotected by patent, can long continue to be produced by a single firm."

Something approximating the formula could in various ways be ascertained and one beverage after another came upon the market until there was a numerous class known as cola and caffeine drinks. Respondents, on page 154 of their brief, mention sixty-eight by name, and it is true as they say (page 152) that "the testimony herein shows that the public recognize that

the beverages to which those of the parties belong is a large and well defined class of drinks." And while respondents have attempted to show that the names "Koke" and "Dope" are generic and may signify one cola drink as well as another, although a not very confident argument is made in behalf of those names as specifying and signifying their own beverage, they make no attempt to show that the name "Coca-Cola" has, by any one since by Mayfield in 1888, been applied to anything but the product of the petitioner.

Respondents' Witness, W. M. Sidebottom (Rec., vol. iii, p. 1163), says:

> "There are now a great many cola drinks on the market; the Celery Cola, Star-Cola, Cola-Ade. I have known of cola drinks on the market to my best recollection, twenty-five or twenty-eight years, I guess. I have never seen a cola drink that was not the same general color. All cola drinks are very similar in taste."

Respondents' witness, Adam Diehl (Rec., vol. iii, p. 1084), says:

> "There are forty or fifty other cola drinks on the market today that I know of; I could not mention them all. I have known of cola drinks in the market I suppose twenty-five years. They are all about the same color as Coca-Cola.. All cola

drinks have the same taste with some little difference, but there is a similarity amongst them all."

J. C. Mayfield, Sr., (Rec., vol. vi, p. 2424) says that prior to Dr. Pemberton's death, which was in 1893, he was experimenting with Celery Cola, and Dr. Pemberton then said to him that "these caffeine beverages ought to be at the soda fountain what the alcohol beverages are at the bar-room; ought to have a great many with different flavors; get more business."

And so from the beginning they increased in number and variety, and they were like as teas are like, and coffees are like, and they varied as one tea varies from another, and one coffee from another. And again they differed because of the method of their making as two cooks will get from a like quantity and quality of tea and a like volume of water, two very different beverages so far as taste and flavor are concerned.

But as one producer after another came into the field with a beverage imitating Coca-Cola, and with a name for it that was suggestive of or suggested by Coca-Cola, no one, though it may seem strange, ever adopted the name literally. The closest resemblance disclosed by the list on respondents' brief, page 154, is Cola-Nola. In 1910, one Fletcher ventured somewhat closer, using the words "Fletcher's Coca Cola," but without the

hyphen, and Coca Cola not in the script form employed by the petitioner; conceding that the petitioner had the exclusive right to the name in the script form used by it. He, however, was promptly proceeded against and enjoined first, preliminarily, *Coca-Cola Company v. Nashville Syrup Company,* 200 Fed. Rep. 153, and finally, 200 Fed. Rep. 157, and this action of the District Court was affirmed by the United States Circuit Court of Appeals in *Nashville Syrup Company v. Coca-Cola Company,* 215 Fed. Rep. 527. Practically speaking, by common consent, the name Coca-Cola was conceded to the petitioner, but grudgingly, and with a disposition to infringe upon it as much as possible.

It is evident indeed from these names alone that Coca-Cola had acquired a distinctive, secondary signification about which a good will had been built up, else any name that would suggest a cola drink would serve as well as one imitating this particular compound designation. And they ventured not to adopt it literally, because that would appear as too bald an attempt at the appropriation of the petitioner's trade.

We cite the testimony of dealers, druggists and confectioners, and confine ourselves to the respondents' witnesses:

Dr. H. O. Null (Rec. iii, p. 1064):

"We keep the Coca-Cola in a tank with the Coca-Cola label, labeled Coca-Cola, and the other drinks we have no regular label for them."

F. M. Bogart (Rec. iii, p. 1071):

"When customers ask for Coca-Cola we serve them Coca-Cola. We do not serve the other drinks when they ask for Coca-Cola."

William F. Davis (Rec. iii, p. 1105):

"When a man distinguishes that he wants the Coca-Cola drink in any manner, that means the Atlanta Coca-Cola."

Paul E. Webb (Rec. iii, p. 1121):

"When a man asked for Coca-Cola, I served him Coca-Cola."

Brants Darden (Rec. iii, p. 1127):

"I never served when Coca-Cola was called for, anything except Coca-Cola."

John R. Pardue (Rec. iii, p. 1134):

"If he (the customer) calls for a Coca-Cola, I give him Coca-Cola."

P. E. Johnson (Rec. iii, p. 1157):

"When Coca-Cola is called for at the Warner Drug Company they serve Coca-Cola."

W. M. Sidebottom (Rec. iii, p. 1164):

"When Coca-Cola is asked for at Dorider and Sidebottom's, I served Coca-Cola."

J. G. Booth (Rec. iii, p. 1170):

"If he (the customer) wanted the original Coca-Cola, if he is that particular about it, he ought to call for it under the real name of Coca-Cola and not a substitute name."

J. B. Freed (Rec. iii, p. 1173):

"If a man comes in and wants Coca-Cola I give it to him."

J. M. Smith (Rec. iii, p. 1183):

"If I have both syrups in my fountain invariably if a man asks for a Coca-Cola I give him Coca-Cola."

F. H. Willis (Rec. iv, p. 1191):

"When they ask for Coca-Cola, I give them Coca-Cola."

J. C. Price (Rec. iv, p. 1208):

"Coca-Cola is the genuine cola drink, that is the product made in Atlanta."

Malt Wilson (Rec. IV, p. 1211):

"When a man comes into my place and asks for a Coca-Cola, I tell them I have not got Coca-Cola, I tell them I have Gerst's and very seldom they will walk out."

T. H. Lever (Rec. iv, p. 1240):

"I instruct my boys at the fountain when a man asks for Coca-Cola, to give him Coca-Cola."

E .A. Sharp (Rec. iv, p. 1253):

"If a man asks for Coca-Cola he wants Coca-Cola, and if he asks for a dope he means most anything in that line, * * * Those other drinks cost us less than Coca-Cola and that is the reason for it; everybody does it."

W. B. Arnold (Rec. iv, p. 1309):

"I have had calls for Coca-Cola at our fountain, when they asked for Coca-Cola I told them I did not have Cola-Cola, but I could give them Koke."

G. G. Desouchet (Rec. iv, p. 1350):

"When a man comes in and asks me for Dope I give him Dope and if he asks me for Coca-Cola I tell him I have not got Coca-Cola, but I can give him some Dope."

Omer Reed (Rec. iv, p. 1355):

"When a man calls for Coca-Cola I would give him Coca-Cola if I had it. I would not give him Dope."

E. D. Montgomery (Rec. iv, p. 1363):

"Coca-Cola is a drink made in Atlanta by The Coca-Cola Company."

J. L. Drake (Rec. iv, p. 1403):

"If he (the customer) asked for Coca-Cola I would give him Coca-Cola."

H. F. Crisler (Rec. iv, p. 1426):

"Customers come in and ask for a Coca-Cola if they want the genuine Coca-Cola; if they want some other cola drink they ask for a Koke or Dope." * * * "Coca-Cola is supposed to be made in Atlanta, Georgia."

Dr. J. G. Pyle (Rec. v, p. 1722):

"I gave the dispensers instructions with reference to the sale of Koke and Coca-Cola. * * * And I told them if they called for Coca-Cola to give Coca-Cola and if they called for Koke to give them Koke."

O. T. Maxwell (Rec. v, p. 1733):

"I speak of Mr. Candler as the Coca-Cola people."

C. J. Thornton (Rec. v, p. 1772):

"Whenever a man come in and was particular enough to ask for a Coca-Cola we were always particular enough to give what he asked for."

A. S. Goody (Rec. v, p.1792):

"When they ask for Coca-Cola I give Coca-Cola."

W. A. Hickman (Rec. v, p. 1828):

"You take most traveling men they call for Coca-Cola, when they want Coca-Cola; they call for Coca-Cola by the name of Coca-Cola."

All of the testimony on this subject is in harmony with these quotations. The witnesses were soda foun-

tain men, dealing directly with the public. What we have quoted from them has not reference to specific instances but to general usage, covering a greater or lesser number of years as the witness had been in the business a greater or lesser time. There were other cola and caffeine drinks almost from the beginning and others came into use in quick succession, but none of them except petitioner's product was ever intended when Coca-Cola was designated.

Mayfield and his associates themselves recognized this. W. McCarty Moore was in the business with Mayfield for a time and assisted in organizing the business in Texas. They considered everything at that time, how to make their beverage, how to put it up, what to call it and how to market it. This was about three years before the present suit was instituted. The inducement to going into the business was the opportunity presented to get the benefit of the good will which had been built up by The Coca-Cola Company through years of industry, enterprise and advertising. Moore understood that the man he was to engage with had formerly been a chemist with or a partner in the Coca-Cola business (Rec. v, p. 1738). They decided on a label which "appears to be an almost fac-simile of The Coca-Cola Company's label" (Rec. v, p. 1744). He took various labels to the printer, including a Coca-Cola

label and one that Mayfield had been using at Shreveport (Rec. v, p. 1753). "The printer followed the Coca-Cola label out more closely in the Koke label than he did follow the Mayfield label" (Rec. v, p. 1754). "I presume the question was discussed at the interview we had with counsel, that Koke was used by the public as as abbreviation for Coca-Cola. I am pretty sure we discussed mighty near everything that was possible to discuss regarding it. * * * *We were advised we had no right to sell our product as and for Coca-Cola when Coca-Cola was asked for*, of course, and *vice versa* that they had no right to sell Coca-Cola when Koke was called for" (Rec. v, p. 1754).

They were not concerning themselves about the other ola, and coca and cola names. It was the benefit of the good will of the business that had been built up under the distinctive Coca-Cola name they set out to get, but they recognized that the literal adoption of that name was not open to them because it designated the particular product of The Coca-Cola Company.

And J. C. Mayfield, Sr., himself, in his testimony admits the fact. "By substituting I mean to sell a man one beverage when he has called for another. If he has a call for Coca-Cola and served Koke or Dope or *vice versa*, that is a substitution" (Rec. v, p. 1689).

Counsel for respondents in the schedule of evidence filed by them, say as to this (page 215):

> "Why, if any one were to ask Mayfield today if he were making 'Coca-Cola,' he would tell them 'No,' that he is making 'Koke,' but that it is made according to the *original* formula for 'Coca-Cola' that Dr. Pemberton originated (except for the modification made necessary by the Food and Drugs Act). If he had been representing to the public that he was making 'Coca-Cola,' plaintiff would probably have sued him long ago for unfair competition for attempting to sell his goods as its goods."

It is beyond controversy that excepting the cocaine, Coca-Cola is today what it was when first placed upon the market under that name. The predecessors of the petitioner bought the formula from Dr. Pemberton and there is no evidence to show that there has been any change in it, except the elimination of the cocaine from the coca leaves used. And this change did not effect either an adulteraion of the beverage or a misbranding of it under the Food and Drugs Act. On the other hand it was both as to the formula and as to the name, a compliance with that Act. Coca-Cola was as much a coca beverage as the law allowed. It could not contain cocaine and continue on the market.

Coca and Cola Not Useless Ingredients.

It is beyond a doubt that Coca-Cola signifies in the public mind the beverage made by the petitioner, and that it signifies no other beverage. And this has been the fact for thirty years, much more than ten years prior to the passage of the Trademark Act of 1905. It is beyond doubt also that Coca-Cola contains extracts of coca and of cola. So we have here an instance of a product bearing a name suggestive of some of its ingredients, the name, however, having attained and maintained a secondary significance which indicates the maker.

To meet this situation the respondents attack the product itself and say that the extract of coca and cola used in making it is useless, contributing to the compound nothing of any kind of value, and that the beverage would be the same if it were omitted altogether. Therefore they contend the name is a deceptive one for which the petitioner is entitled to no protection. They undertake to support this contention by the testimony of chemical experts who assume to show by chemical analysis what contribution is made by each of the various ingredients used to the taste, savor, aroma and flavor of the beverage.

Their principal reliance is Dr. Kessler. In his view the beverage, even as first made, got little, if any, taste

or flavor from the coca and the cola used. "In my opinion," he says (Rec. vi, pp. 2466-8) "the taste of Coca-Cola is essentially the taste of lime juice. The taste of course is modified slightly by the vanilla and other materials, but the main constituent of the taste outside the taste of the syrup, of course, which you taste the sweetness of it, outside of the presence of the phosphoric acid which you taste, that is the sourness of it, the principal flavoring substance in it is the taste of the limes. Coca leaf is similar to the tea leaf in a great many respects. * * * It contains not much of any flavoring substance. It has not much odor or flavor. * * * The Kola nut has practically no flavoring qualities whatever."

This he says of coca leaves in their natural condition. When they have been decocainized that is, "Coca leaves when they have been extracted with toluene smell spent, and they smell very differently from the original coca leaves. They have lost their odor largely" (Rec. vol. vi, p. 2472). So he finds marked differences of odor and flavor in the different conditions of an herb which in its best estate had "not much odor and flavor."

He has not a word for the glycerine in the compound and by assigning all the functions to other ingredients,

eliminates that as useless along with the coca and the cola.

The doctor deals with the matter largely as one of quantity, or proportion, of ingredients. He says that the total extractive matter in coca leaves is forty-six per cent. of the weight of the leaves, which in three hundred and eighty pounds of the leaf, the amount used in making nine hundred gallons of Merchandise No. 5, comes to 180.80 pounds (Rec. vi, p. 2473). Merchandise No. 5, he says, "when made without cola nuts, contains 2.25 per cent. of solid matter" (Rec. vi, p. 2471). This, in turn, means that from the three hundred and eighty pounds of decocainized leaves used in making the nine hundred gallons of Merchandise No. 5, there is obtained one hundred and sixty-two pounds of extractive matter out of 180.80 pounds contained in the leaves originally. We are asked to believe that in the less than eighteen pounds extracted in the decocainizing process, including the 1.9 pounds of cocaine, resides whatever there is of value in the way of taste, smell, savor, flavor or aroma of the coca leaf, and it is further contended that the cola nut has practically no value in that way.

Another chemist called by respondents, Dr. Simonson, testifies that in Merchandise No. 5 made with and without the decocainizing process there was some

difference in odor and a considerable difference in taste. In the latter method the aroma of the coca leaf was much more marked (Rec. vi, pp. 2504-5).

A third chemist, Dr. Meserve, says (Rec. vi, p. 2465) that he has compared the aroma of the Coca-Cola syrup and the aroma of the flavors from coca leaf and noticed no resemblance.

As to the cola nut, Dr. Kessler says that it "has practically no flavoring qualities whatever. Kola nut is a hard, woody nut. When you chew the nut it tastes like so much hardwood sawdust. It tastes a little bit bitter, but has no more flavoring in it any more than hardwood sawdust has a flavor" (Rec. vol. vi, p. 2468). Bitter, however, is a taste or savor and the cola nut is distinctively bitter for it is defined or described in the Century Dictionary as "a brownish bitter seed," and then it has, the Encyclopedia Americana says, a potency which has eluded the chemists altogether. The one hundred and twenty-five pounds used in making nine hundred gallons of Merchandise No. 5 contributes .13 of one per cent. of that extract (Rec. vol. vi, p. 2471), which means that about ten pounds of soluble matter is derived from the nuts. If this is not much in the way of weight it is to be remembered that bitterness is a quality not determinable in avoirdupois.

The chemists called by the petitioner express themselves somewhat differently, but this issue can not be settled by chemical analysis and chemists as such are not experts in what is here involved.

This Court, in the government case, found that Coca-Cola was 52.64 per cent. sugar, and 42.63 water. To this were added "coloring, flavoring and other ingredients in order to give the syrup a distinctive character," l. c. page 284. That this was the purpose of Dr. Pemberton, and his associates, is beyond doubt. They were striving for a new and distinctive beverage, and they thought they had gotten it, after many experiments, by added ingredients that constiuted 4.73 per cent. of the syrup and only .6 of one one per cent. of the beverage. These added ingredients consist of caramel, phosphoric acid, lime juice, caffeine, an extract of various flavoring oils, glycerine and Merchandise No. 5 (Rec. vol. vi, p. 442). What proportion of each is not disclosed, but we can calculate that of the No. 5 there is 1.28 per cent. in the syrup, leaving 2.99 per cent. for the six other added ingredients or an average of a little less than one-half per cent. each. Having disposed of No. 5 as being useless because not enough of it, the same is done with glycerine for a like reason, and so one ingredient after another is eliminated as not being sufficient to be effective until only the

sugar and water are left. And when we pass from the syrup to the beverage, this quantitative insignificance of the added ingredients becomes more pronounced. An ounce of syrup is attenuated by six ounces of water, and so the percentages of the added ingredients must be divided by seven, leaving but .61 per cent. for the caramel, phosphoric acid, lime juice, caffeine, flavoring oils, glycerine and Merchandise No. 5. Of these the Merchandise No. 5, which constitutes .18 per cent., and the glycerine and the caramel, are rejected as having no effect on taste or flavor, leaving, we know not how much, less than .43 per cent. to give distinctive character to the beverage. And so any name suggestive of any of the added ingredients would be deceptive.

The argument of the respondents addresses itself only to the coca and cola elements, but goes to the extent that these never contributed substantially, or at all, to the taste or flavor of the beverage. The subhead of their brief (page 49) announces in capitals that

> "COCA AND COLA ARE NOT IN FACT FLAVORING AGENTS."

This contention was determined against them by both lower courts. The only finding of the Circuit Court

of Appeals as to the name being in any wise deceptive is based upon the fact that the caffeine in the syrup is derived almost altogether from tea leaves and not from the cola nut.

The lay testimony on the question of taste or flavor, and that is the competent testimony in the case, is overwhelming against the respondents, and amply sustains the findings of the lower courts.

J. C. Mayfield, Sr., who is, and from the beginning, has been the mainstay of respondents, differs radically from his chemists. He believes that the Pemberton formula, and every element of it, was essential to the beverage. He asserts that he got the original formula, and always made his beverage in strict conformity therewith, modifying it only as required by the Food and Drugs Act. The petitioner denies that Mayfield got the formula from Pemberton, but admits that he has been diligent in trying to get it. And so far as he was successful, he got it piecemeal.

In his letter to Judge Brown (page 140), petitioner's schedule, he discloses his *modus operandi*. As to the use of the glycerine in the compound: "I got that from the negro that worked for Coca-Cola Company, * * * * and Brooks, the old Coca-Cola drummer, told me some things last winter just before I left Atlanta." The final result as claimed by Mayfield and as

stated in his own words, is (Rec. vi, page 2438), "I don't make it, that is, I don't make 'Coka-Cola,' I mean there that I did not make and label my goods Coca-Cola, but I did make the same goods and label it 'Koke.' I did not say it there, but that is the facts in the case. *The same goods from the same formula.*" And counsel for respondents commenting on this says: "Why if anyone were to ask Mayfield today if he were making Coca-Cola, he would tell them no, that he is making Koke, but that it is made according to the original formula for Coca-Cola that Dr. Pemberton originated, except for the modification made necessary by the Food and Drugs Act" (Respondents' schedule, p. 215).

The practical Mayfield agrees with Dr. Kessler that the coca leaf is similar to the tea leaf in a great many respects. He does not agree that it contains "not much of any flavoring substance" or that independently of the cocaine it is of no value in the beverage, for when he eliminated the coca leaves he found it necessary to substitute an extract of the tea leaf to preserve the flavor. And the glycerine, too, is not negligible in his view for he thought he had made a valuable acquisition when he learned from the negro, who worked for The Coca-Cola Company, that it was contained in the formula. What it was that Brooks, "the old Coca-Cola

drummer," told him is not disclosed, but the mention of it in the letter to Judge Brown is such as to indicate that it was of importance.

Thus Mayfield got the formula as well as he could and held to it as well. He made "the same goods from the same formula," but he labeled the product "Koke" instead of Coca-Cola.

Mayfield knew what the undisputed evidence shows, that Pemberton and his first associates got what they were striving for, a distinctive beverage, which was recognized as such by the public as soon as it was put on the market.

And the new elements in it were the coca and the cola. These being then used in the crude form of leaf and nut were in bulk much the greater part of the ingredients added to the simple syrup and so helped to indicate the name. To some tastes the difference between Coca-Cola and soda fountain beverages, already in use, might not seem substantial, but who shall say what is a substantial difference? The public recognized difference enough to put this beverage in a class by itself. And soon competition sprung up—almost at once, and various beverages, asserted to be made according to the Pemberton formula, so far as that formula was discoverable by analysis or otherwise to the number of a hundred or more, were placed upon the

market, and they were known by the trade and by the public as coca, or more generally as cola drinks. They were not classified as soda water, or root beer, or lime juice or sarsaparilla, but as cola drinks. They had a taste and flavor of their own, as tea and coffee, and wines and liquors have, each its own taste and flavor, and differed as among these there might be differences in the same class. And Coca-Cola was the prototype of its class. Its proprietors were first on the market, and by energy, industry and liberal advertising and keeping their beverage up to the standard, they held their place. The competition which they had to meet resorted not only to imitation of the name, but of the formula of the beverage as well, and this was so because the beverage was distinctive in fact as well as name. If the coca and the cola signified nothing, if it was a mere matter of lime juice, flavoring oils and caramel, there was no occasion for the years of diligent searching by Mayfield and no doubt by others to find out how Coca-Cola is made.

Mayfield swears that he had the formula accurately from Pemberton himself, and was using it when the Food and Drugs Act came into effect. Then he must eliminate the cocaine. If the coca leaf had only a therapeutic effect, if it did not add to, take from or modify taste or flavor and the only thing required to

be done was to eliminate the cocaine content, that would be accomplished by leaving out the coca leaf altogether. Mayfield says he did leave out the coca leaf entirely, but that was not all he did. He added something in lieu thereof that had practically the same flavor as the coca leaf. "We added Imperial China tea, flavoring extract" (Rec. iv, p. 1646). So there was a flavor to be preserved if the general character of the beverage was to be preserved.

The petitioner eliminated the cocaine from its product, but did not eliminate the coca leaf entirely. It simply extracted the cocaine and assumed that the use of the decocainized leaves would serve to preserve the taste and flavor of the syrup and beverage.

Was it wrong in this assumption? If the beverage was impaired in taste or flavor, those who used it would know. They would know better than any chemist. The test was to taste it. Not to analyze it. It was a question for the human palate; not for the laboratory. We have called attention to the fact that witnesses by the hundred were called in the case, and not one of them who used the beverage testifies that he noted a change in it. And not one of those who sold it testifies that any one to whom he sold it ever suggested that there had been a change. Respondents ignore this testimony altogether. The lower courts did not.

If what was contributed by the coca leaf to the taste and flavor of the beverage had been eliminated with the cocaine, and nothing had been substituted, and petitioner made no substitution, the beverage would have fallen out of the class of cola drinks, of which, however, it remains to this day the standard. But the general similarity of cola drinks in taste and flavor is testified to by a host of witnesses. As is natural, and as is the case with many beverages, and with other articles of food, the recognition of differences of taste and flavor in the things of the same class varies with different persons and all the way from perceiving no difference at all, to one so marked as to extend from a decided liking to a positive aversion. This is reflected in the testimony, as the schedule submitted by respondent shows. They submit (pages 146 to 148) a long list of what they say are "Drinks now on the market having the same color and taste as Coca-Cola." And in this same schedule they collate the testimony of witnesses to the effect that cola drinks have the same general taste.

J. C. Mayfield, Sr. (Respondent's Schedule, p. 149):

"I never saw a cola beverage that was not the same general color or the same general taste."

Adam Diehl, Manufacturer of Star Cola (page 150):

"All cola drinks have the same taste • • • I have never tasted one not the same general taste as ours."

John D. Fletcher, Manufacturer of Fletcher's Cola (page 150):

"I know of others on the market, cola beverages, probably a dozen or more • • • They are similar in taste to Coca-Cola. They all have pretty much the same general taste."

Henry Boerger, President of the Chattanooga Bottling Works (page 151):

"The taste of these cola drinks mentioned are all very near the same, similar in taste."

R. F. Zimmerman, Bottler of Tru-Cola (page 152):

"I could not distinguish (cola drinks) one from the other and the tastes were very much alike, the ingredients were almost the same as the original 'Coca-Cola' of today."

The testimony of many other witnesses, to the same effect, might be cited, but it is needless as there is no conflict in the evidence. Every one testifying upon the subject speaks of Coca-Cola as a cola drink, as

having the taste and flavor peculiar to cola drinks. No consumer so much as suggests that it has lost its quality. This testimony is not restricted to the time of the trial, but extends to all the period from the day it was first put upon the market to the day the testimony was given. This, we submit, is conclusive that Merchandise No. 5 was not for beverage purposes, a useless and inert substance.

Nor was this all. To support and confirm their views the lower courts had samples of Merchandise No. 5, and of decocainized coca leaves, and were able, by actual experiment, to ascertain whether there was in them any smell or flavor. Respondents' Exhibit No. 234 (Rec. vol. vi, p. 2469) is a bottle containing Merchandise No. 5, prepared by respondents' witness, Dr. Kessler, according to the method described by Dr. Caspari. It retains, to this day, a pronounced odor. Respondents' Exhibit No. 235 (Rec. vol. vi, p. 2472) contains decocainized coca leaves, and after more than five years they still have a perceptible odor resembling that of tea leaves.

The proof is clear and conclusive that Coca-Cola, when first put upon the market, was a distinctive beverage in taste and flavor, and that it has retained this distinctive quality, and as a beverage is what it always was, saving the element of cocaine. That the

name became deceptive because of the elimination of the cocain is simply a contention of the respondents decided against them by both the lower courts.

Respondents argue elaborately (page 146, *et seq.* of their brief) that "Koke" and "Dope" do not "designate plaintiff's product exclusiveley." And they seem to concede that their own attempt to hold those names as trademarks was entirely unwarranted. "It was a good scheme from a business standpoint, but the plaintiff quite naturally objected to the good will of *the class of drinks of which Coca-Cola is the most widely known example,* being thus gobbled up" (Respondents' Brief, p. 150).

The comparison of Coca-Cola with its rival beverages has always been the same which could not be so, if its own composition had undergone radical change. No one of all the three hundred witnesses called in the case suggests a change in the taste or flavor of Coca-Cola, or that there has been a change in the other cola drinks to match a change in Cola-Cola. It remains the standard in its class, imitated as closely as possible in formula and trade name by its competitors.

Between food preparations of the same kind, the differences are comparatively slight. Chemical analysis might find coffees from different fields of production to be precisely alike, and to some persons there would

be no difference in taste or flavor. There are various blends of coffee on the market under distinctive trade names, but surely the trade name of any of these would not be denied protection because chemical analysis did not discover something that substantially differentiated it from other blends. Nor would it invalidate the name that everybody did not discover in it a distinctive taste or flavor. If a merchant made a blend which people liked, and he had built up for it, under the name he had given it, a valuable good will, no one should be permitted to appropriate his trade by the use of the name upon the ground that the coffee was not very, or at all different from other coffee, and that a like blend, or one as good or better could be gotten in a hundred different ways. The relative values of the ingredients are not brought into issue in a case like this. The question is one of fair dealing with the public. The presence of coca and cola is suggested and the suggestion is a truthful one. The entire compound is what it is claimed to be. Those who buy it get what they ask for, what they want and what they pay for. And as we are not concerned with therapeutic effects, which are essential when they are involved, it is not competent to resolve the beverage into its elements and cavil as to the contribution which each makes to the taste and flavor of the compound. There would be no legal standard for determination of the controversy. The

measure would be the palate of the chancellor more variable than that of the chancellor's foot.

Character of the Defense.

The character of this defense does not commend it to the favorable consideration of the court. It was found by the District Court that the respondents' methods of marketing its goods were adopted and used by them and their predecessors "with the deliberate purpose of representing their goods to be the product and manufacture of The Coca-Cola Company" (Rec., vol. i, pp. 242 and 243). And the Circuit Court of Appeals found that respondents, among other things, selected the word "Koke" as the name of their product "for the purpose of reaping the benefit of the reputation and advertising of the complainant, and because it would permit the defendants to better dispose of their product as and for Coca-Cola" (Rec., vol. vi, p. 2601). This practical conduct of their business is a direct negation by respondents of the contention they make in the suit. If Merchandise No. 5 is a useless substance, if it contributes nothing to the savor or flavor of the beverage, then Coca-Cola is not a cola drink. But the consuming public do recognize the beverage as a cola drink and prefer it above all others of the class. The most glowing advertisements can not give

quality to the drink. Quality must stand the test of the palate. Cola-Cola has done this and there is a great and valuable good will attached to its manufacture and sale. The respondents recognize all this, not only that Coca-Cola has been widely advertised, but that it is recognized and approved by the public taste as a cola drink, and deliberately proceed to imitate the beverage as closely as they can, and to bestow upon this imitation such a name and adopt such methods of marketing as are calculated to make the public believe that their product is the product of the petitioner. Called to account for this conduct, they answer that what they have thus imitated in substance and in name is not at all what it purports to be and that what they have put upon the market as a counterfeit is the only genuine article. What is imitated is mere dross, while the imitation is pure gold. Their beverage is a real cola beverage, that of the petitioner is without quality of any kind. Even where a medicine was involved it was said that such an argument "comes with ill grace from those who imitate it as closely as they may without possessing a complete knowledge of its formula, and by unfair trade sell the simulated article as and for the genuine." (*Samuel Bros. & Co. v. Hostetter Co.*, 118 Fed. 257, l. c. 260.

It is not simply that the respondents' contention is an ungracious one. It is that, and in addition to that it is obviously a false one. It is belied by their conduct. They do not themselves believe it. They accept Coca-Cola as the public accepts it, as a beverage of the cola kind and class, and as the best of its kind and class. They say this when they imitate it. They say it when they sell their imitation as the original. To avoid accountability for this conduct of their business, they now disparage the beverage and say that it is worthless and tasteless stuff. Dealing with a similar situation in *Curtis v. Bryan*, 2 Daly 312, l. c. 318 and 319, the Court said:

> "It is diffisult to conceive upon what principle of equity this defendant should be heard to raise this objection. *His own conduct in regard to the subject matter is an unequivocal concession to the goodnes and value of the plaintiffs' article.* He interposes the objection to avoid an injunction which restrains him from imitating the plaintiffs' article. After plaintiffs' preparation had been in use for nearly twenty-five years, its sale having been steadily increased during all that time, the defendant appears and places upon the market an article which, by the practices and arts to which he has recourse, he would have the public purchase as the plaintiffs' article.
>
> "If the article was not a good one why should the defendant imitate it? If it was injurious to

health, it is not reasonable to suppose that a prudent man would venture to introduce a similar article under the same name and hope to succeed."

* * * * * * * * *

"Experience is an excellent teacher, and the fair trial of an article will furnish unerring evidence of its worthlessness or value. It is obviously true that if a medicine can stand the test of twenty years of experimental use, and grow steadily and constantly in favor, its properties can not be injurious. But as before observed, the good faith of this defendant, in raising this objection, may reasonably be questioned and and I am satisfied that it does not lie in his mouth to make it. If a man's acts are any indication of his belief, on any subject, the conduct and admissions of the defendant constitue a complete refutation to this objection. A man's faith is shown by his works."

If the popular opinion may be trusted to come to a correct conclusion respecting a medicine, dependent, for its merits, upon subtle therapeutic qualities, much more may it be trusted as to the taste and flavor of a harmless beverage. The product of the petitioner has been upon the market for more than thirty years and has met with continually increasing favor. After it is well established in popular favor, the respondents imitate it with a product of their own, palming it off on the public as the product of the petitioner, and seek to justify this conduct by the contention that the bever-

age has not the taste and flavor claimed for it by the petitioner, nor that claimed for it by the respondents as well in their dealings with the public. It is obvious that in this contradiction the truth lies on the side of the business practice of the respondents.

How to deal with such a situation is indicated by the court in *Hostetter Co. v. Martinoni,* 110 Fed. Rep. 524, l. c. 526 and 527:

> "While the precise formula is claimed as a trade secret by complainant, analyses show the preparation to contain certain solid extracts having medicinal properties. Experts upon any subject are prone to conflicting opinions in this day of evolving theories and progressive research, and the medical experts testifying in this case exhibit this general characteristic. But the court need only concern itself with inquiry as to the merits of the preparation to the extent of discovering whether it has sufficient merit to justify the court in protecting complainant's right therein, whether complainant has come into court with clean hands, under the fundamental principle that he who seeks equity must do equity. The preparation is designed for the use of the public. The public has tested it for a great number of years, and has stamped it with its seal of approval, as evidenced by the increased demand for the preparation. This is certainly proof of its commercial value, and presumably establishes the fact that it possesses merit."

We are dealing here, not with a medicine, but with a beverage. There is no contention that the beverage is a noxious one. The precise formula, according to which it is made, is claimed as a trade secret. We have experts testifying not for and against the medicinal virtues of the beverage, but to how much or how little certain ingredients contribute to its taste or flavor, whether it is the kind of beverage it purports to be. Has it sufficient merit to justify the court in protecting the petitioner's rights therein? The beverage is designed for public use and it has been in public use for more than thirty years. It has been approved by the public as evidenced by the great and steadily increasing demand for it, and this is presumptive evidenece of the highest force that it has commercial value as a staple of business, and possesses merit as a popular beverage.

Koke a Mere Abbreviation of Coca-Cola.

That "Koke" is but an abbreviation of the name Coca-Cola, that it was not adopted by respondents in 1888, and in fact not until 1909, and was then adopted and made use of by the respondents and their predecessors "with the deliberate purpose of representing their goods to be the product and manufacture of The Coca-Cola Company" was expressly found by the Dis-

trict Court, in its decree (Rec., i, p. 242), and that finding was approved by the Court of Appeals (Rec., vi, p. 2601).

The question as to the time when the respondents began the use of the word Koke was one of fact and the Court below was fully justified in not crediting the testimony of J. C. Mayfield, Sr. He is not a trustworthy witness. He shapes his testimony to meet the requirements of his case. His own correspondence and sworn admissions furnish the proof of this.

In 1905 Mayfield had in hand a suit by one of his companies to enforce trademark rights in the name of Celery-Cola. The defense of unclean hands was made, based upon the fact that his beverage contained strychnine and cocaine. And this is how his counsel, F. T. F. Johnson, proposed to wash the hands. Writing to Mayfield from Washington, under date of December 13, 1905, he said (Petitioner's Schedule, p. 180):

> "It is absolutely necessary that your beverage 'Celery-Cola' should contain both Celery and Cola, and the fact that it contains additional ingredients greatly strengthens your case. Even if your mixture should contain nux vomica I can not see that this would affect the case in the least. It is true that nux vomica is a poison, as are all other drugs, but it is also true that it is one of the best and most

effective ingredients of 'tonics' usually prescribed by physicians. The fact that your beverage contains cocaine should not affect your trademark rights, but in view of the great howl that is now going around the country concerning beverages and patent medicines, I would advise that any analysis that you may have made of your beverage should fail to show the presence of that drug. I would, therefore, advise that you make up a vat of your beverage, increasing the quantity of celery and leaving out the cocaine. Then take samples of the beverage from this vat and have them analyzed. Attend to this matter yourself, and have one of your employes, whose business it is to bottle the goods, take the samples from this tank, so that he can be put on the stand as a witness and testify that the samples were taken from the tank or tanks from which the beverage sold to the trade was taken."

Respondents say (their schedule, p. 224) that "whatever idea the attorney Johnson may have had in writing his letter (Exhibit 13) can hardly be wished off on Mayfield and the latter held responsible for it." That depends, of course, upon what Mayfield did. In his testimony in this case (Rec., 2440) he says, "I did not comply with the sugegstions therein contained." In fact, he did.

Promptly on receipt of the letter by him he wrote to his associate, Pogue, as follows (italics in first paragraph ours):

"Birmingham, Ala., Dec. 15, 1905.

"Dear Pogue:

"*I am expressing you the box of extracts. The boys made a misstake last night. I personally superentended the shipping of this box.* Now, if you want any more expressed to Baxter or any one else, wire me and I will get it off promptly.

"Enclosed find a letter from our atty. in Washington, D. C. (The man that secured the trademark.) I am in favor of having him associated with Mr. Anderson—it will be a little expensive, but we *must* win this case, for Celery Cola is my all. Confer with Mr. Anderson about this. Show him the letter from atty. in Washington *at once*. It's important that we do all we can to win our case. I will write Mr. Johnson this P. M., and keep you posted.

"Write me every day.

Yours truly,

J. C. Mayfield."

The foregoing is typewritten. Then follows this autograph postscript (italics ours):

"Johnson thinks we ought to mention 3 or 4 other things—we could mention Vanilla Extract of 'Tea' Coffee, prune juice, lime juice, etc.

The Box C. C. shipped today is marked [P] *so that you may know this is the box you want*, have

your chemist look for Kola & Celery—they will find 18 ingredients if they could analyze, but they are all in small quantities." (Petitioner's Schedule, p. 183 and 184.)

The meaning of this is very plain. "The boys," employees, no doubt, had shipped a box the night before, and had made a mistake for the letter from Johnson had not arrived. Another box was sent on the fifteenth, after receipt of the letter and Mayfield "personally superintended the shipping of this box." And that Pogue might know which was "the box you want" and not make the mistake of taking to the chemist the box the boys had sent by mistake, he had marked the personally superintended box [P].

Furthermore the attorney Johnson was retained in this very litigation now pending between The Coca-Cola and the Kope Companies, that is in the branch of it carried on before the Patent Office (Respondents' Schedule, pp. 253 and 262).

"It is important that we do all we can to win our case."

Respondents say that these letters are privileged communications "which should not have been introduced into the record." We can not concede this. They were not privileged communications between

counsel and client. They constituted a plotting to determine by corrupt methods the result in a pending case.

Another instance of Mayfield's doing what must be done to gain his case appears in connection with what is known as the Rice Case. In the case at bar Mayfield testified that he had the Koke formula as early as 1888, while in the Rice case, tried in 1907, he denied having it. He exeplains this inconsistency by saying that Mrs. Diva Brown, who had been his wife, asserted a right to the formula and was trying to get it. She was, he says, present at the Rice trial, prompting counsel who was cross-examining him with a view to getting the formula out of him in that way and to baffle her endeavors he denied having the formula (Petitioner's Schedule, p. 144). Evading the questions he calls it in this case because they were immaterial and because his property was at stake. Respondents say in defense of his course (Respondents' Schedule, p. 217):

> "Mayfield was just sharp enough to sense all this, and so as he says, in referring to the answers he made to these questions, Rec., 2437, 'I evaded them along that line because they were immaterial and did not have any bearing on the case at issue. As before stated *my property was at stake, and that is why I answered those questions along there as I did.*"

A man "just sharp enough," as Mayfield was, for his own purposes in that case is too sharp to be relied upon for the purposes of justice in any case.

He says that he answered as he did because "my property was at stake." How would such a man determine the question of *meum* and *tuum?*

Property was at stake in the Celery-Cola case, it was at stake in the Rice case and it is at stake in this case, and as the stake determined his testimony in two of the cases, it may have done so in the third.

On the issue as to the name "Koke" there is much evidence by other witnesses, the preponderance of which was found by both lower courts to be in favor of the petitioner, and nothing is shown to call for a review by this court.

The Name Dope Used by Respondents to Appropriate Petitioners' Trade.

Evidence as to this is collated in petitioner's Schedule II. The question again is one of fact. Both lower courts found that the name was adopted by the respondents as a means of appropriating the good will of petitioner's business, as the name Koke was, the one or the other being used, as in one section of the country or another, the abbreviation Koke or the nickname Dope was most used by the public.

IN CONCLUSION.

When this suit was brought and for more than ten years prior thereto, neither the petitioner's product, nor its advertisements of the same were subject to the objections made by the Court of Appeals. The cocaine was eliminated from the coca leaves and the product was advertised to the public and sold as a beverage and not as a medicine. The objection that the caffeine in the product was not principally derived from the cola nuts used is, we submit, without substance. The business of the petitioner as it now exists is the result of what has been done since the year nineteen hundred and not of what was done prior therto. It is the good will built up during the last twenty years that has been invaded by the respondents and that good will has been built up with clean hands and is entitled to protection in a court of equity.

Respectfully submitted,

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